Star Drywall, Plaster & Painting Company *and* Painters District Council No. 35, International Brotherhood of Painters and Allied Trades, AFL–CIO. Case 1–CA–26402

August 27, 1991

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On April 5, 1990, Administrative Law Judge George F. McInerny issued the attached decision. The General Counsel filed exceptions and a supporting brief. On September 25, 1990, the Board, in an unpublished Order, remanded the case to the judge for further consideration of factual matters not addressed in the decision and for analysis of the 8(a)(3) allegation of the complaint. The judge was instructed to make additional findings, conclusions of law, and a recommended Order based on those findings and conclusions.

On January 28, 1991, the judge issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge in his decision and supplemental decision is adopted and the complaint is dismissed.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We correct the judge's inadvertent error in the eighth paragraph of the ''Conclusions'' section in the supplemental decision: the date of the walkout was May 10, 1989, not March 10, 1989. Additionally, the record reflects that, contrary to the judge's statement in the first sentence of the paragraph entitled ''(2) Duclersaint's Knowledge of Charon's Union Activity'' in the supplemental decision, Duclersaint was aware that employees Quigley and Charon talked to the Union on Wednesday, May 10, 1989, during the walkout.

[2] We agree with the judge's conclusion that there is no violation. Assuming arguendo that the General Counsel established a prima face case, we find that the Respondent met its burden under *Wright Line*, 251 NLRB 1083 (1980). Thus, the Respondent established that Charon had been warned in the past for his poor work performance. When Charon was warned again on May 22, 1989, for his poor work performance and his failure to bring proper tools to the job, he responded by arguing and raising his voice and eventually challenging Duclersaint, the Respondent's owner, to terminate him. Under these circumstances, the Respondent has established that even in the absence of Charon's union activity, the Respondent would have terminated Charon.

Benjamin Smith, Esq., for the General Counsel.

Mr. Arnold Duclersaint, of Somerville, Massachusetts, pro se, for the Respondent.

Mr. William F. Murphy, of Dorchester, Massachusetts, Organizer, for the Charging Party.

DECISION

GEORGE F. MCINERNY, Administrative Law Judge. Based upon a charge filed on May 23, 1989,[1] by Painters District Council No. 35 (the Union), the Regional Director for the Region 1 of the National Labor Relations Board (the Board) issued a complaint on July 25, alleging that Star Drywall, Plaster & Painting Company (Respondent), had violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by discharging its employee, Robert Charon. The Respondent filed an answer in which it denied the commission of any unfair labor practices.

Pursuant to notice contained in the complaint a hearing was held before me at Boston, Massachusetts, on October 12, at which time the owner of the Respondent, Arnold Duclersaint, represented himself, William F. Murphy, an official with the Charging Union, represented the Union, and the General Counsel was represented by counsel.

At the hearing all parties had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, and to argue orally. After the conclusion of the hearing the General Counsel submitted a brief, which has been carefully considered.[2]

Based on the entire record in this case, including my observation of the witnesses, and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent here is a sole proprietorship owned by Arnold Duclersaint with his office and place of business in Somerville, Massachusetts, from whence he is engaged in the construction industry as a subcontractor. The Respondent annually purchases goods valued at over $50,000 from the Robert Karp Company, which in turn is engaged in interstate commerce by reason of its purchase of goods shipped directly from points outside the Commonwealth of Massachusetts and valued at more than $50,000.

The parties agreed, and I find, that Star Drywall, Plaster & Painting Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The parties agreed, and I find that Painters District Council No. 35, International Brotherhood of Painters and Allied Trades, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Star Drywall was acting as a drywall subcontractor on a job in Marshfield, Massachusetts, in the spring of 1989. The

[1] All dates herein are in 1989.

[2] The General has also under date of December 11, moved to reopen the hearing and receive an addition to the formal exhibits here. In view of my disposition of this case, I do not feel it is necessary to reopen the hearing or receive the proffered exhibits. The motion, therefore, is denied.

project involved the remodeling of a former school building into elderly housing, and was financed by the Commonwealth of Massachusetts. As in all state-financed projects, the State furnished the general contractor with predetermined wage rates derived from wages paid to laborers and mechanics in the area where the job was located.[3] The rates as determined by the State's Commissioner of Labor and Industries,[4] were applicable to all laborers and mechanics employed on the job by the general contractor and all subcontractors.

The record is not clear on this point, but I think I can reasonably infer that Star Drywall had two categories of employees on this job, carpenters and drywall finishers, the latter referred to in the record here as ''tapers.'' For reasons not explained in the record, the carpenters were members of a union, the tapers were not.[5]

During the first week or so in May, Star's owner, Arnold Duclersaint, needed more tapers to complete his subcontract. Duclersaint was shopping at Robert Karp, in Boston, a store which carried drywall supplies and tools. There he ran into Robert Charon, a taper who was unemployed at the time. Duclersaint asked Charon if he could come to work for him at the Marshfield job and Charon agreed. Charon was a member of the Union, District 35, and had, in his words, 3 years of school and 4 years' experience on-the-job training as a taper. However, there was no discussion of unions or wages at that time.

Charon reported to the job on May 10, accompanied by another taper named Quigley.

From this point the record is very confusing. I believe there is enough credible evidence for me to make findings of fact, however, I think it appropriate to make certain credibility findings before going on to further findings of fact. I find Robert Charon to be almost totally incredible. Aside from his demeanor, which I found to be shifty and defensive, and the total lack of corroboration for any of his critical testimony, from the officers of the Union,[6] or from his fellow employees, I find his testimony about his reporting to work without knowing what his wages would be, and his testimony about his later discussions with Duclersaint about wages to be obviously an attempt to justify his actions to the Union as well as to the Board. I found him to be a completely untrustworthy witness.

Duclersaint's demeanor was more candid, but his memory was poor. His story was corroborated by Carl Smith, another of his employees and, with respect to the times of a meetings on May 12, by Union Organizer William Murphy. My reconstruction of the facts, then, is based primarily on Duclersaint's version of events.[7]

When Charon reported to the jobsite on May 10, he told Duclersaint that he wanted $125 a day, under the table, with no taxes or other deductions taken out.[8]

Charon and Quigley then went to work, where they joined two other tapers, Kimball and Wilson. About 2 hours' later, Wilson and Kimball had talked to a union carpenter on the job who told them the job was union. Wilson and Kimball became upset and walked off the job. Charon and Quigley joined them. Duclersaint, calmed Wilson and Kimball, but Charon and Quigley left and went some where, then returned about 2 hours' later and asked to go back to work. Duclersaint agreed, and they resumed working.

On May 12, Charon was paid $328.12 for 21 hours' work. He then protested that he should be paid union scale. Duclersaint told him that this was the arrangement they had made, but that, if he would rather, he would be paid at the rate fixed by the State for painters in this job, or $19.45. Charon consulted with Harriman, who advised him to return to work on Monday.

There were no incidents involving money the next week. On payday, however, Charon again raised an argument that he should have been paid union scale. Duclersaint explained that the paycheck reflected the prevailing rate of $19.45 with appropriate deductions. According to Duclersaint, Charon ''wasn't happy when he left that job site because he didn't go home with the cash he thought he was going to go home with.''[9]

From this, it seems clear that, in some way or another, Charon thought the job was union, although he had been told it was not, and there is no indication that he talked to anyone about this (except possibly Harriman) or tried to persuade other employees to join the Union. His gripe was only with his own salary.

Duclersaint testified that he had criticized Charon's work on Thursday, May 18. Charon denied that his work had ever been criticized, but I credit Duclersaint's version that, on that day, he had assigned Charon to the finishing stage of the job. He was not performing acceptably and Duclersaint told him so.

On Monday, May 22, Charon reported to work without a ''hawk'' or mortar carrier. He was working on a window frame when Duclersaint again criticized the speed and the quality of his work. Charon began to argue and to raise his voice. Duclersaint testified that Charon was ''slapping [mortar] all over the the place, and told him he couldn't work like that. Charon then said 'Well, are you going to let me go?' like he was forcing me to fire him. I said: 'Well, yes, okay.' So that was the story.''

I find, based on Duclersaint's credited testimony, that Charon was fired, but almost at his own request, for poor workmanship, on May 22. I find that he had been warned before, on May 18, about his workmanship, and that he had reported to work on the May 22. I find that he had been

[3] Massachusetts General Laws, Ch. 149, Sec. 26 et. seq.

[4] Ibid., Sec. 27.

[5] The carpenters measured, cut, and put up the drywall panels, the tapers applied tape to the joints and applied a skim coat and finish coats of plaster to the material.

[6] William F. Murphy, who testified here, was not involved in Charon's alleged meetings with Union Business Representative Ralph Harriman, nor with any conversation between Charon and Duclersaint. Harriman did not testify.

[7] None of the other employes mentioned in Charon's testimony as being on the job with him, Quigley, Wilson, or Kenball testified. The only employee witness who did testify, Carl Smith, testified only about Charon's work, corroborating Duclersaint's testimony in that regard.

[8] Duclersaint said the amount was $100, later changing the figure to $125. The check which Duclersaint used to pay Charon on May 12 was for #328.12, representing 21 hours' work. This figure amounts to $15,62 per hour, or just about $125 per day (actually $124.96. To get $125 a day you would have to increase the hourly rate by $.005). Charon denied that this arrangement was made, but, as noted above, I do not credit his denial, Quigley, who apparently was present, and who settled for $8 per hour, did not testify.

[9] This check was not submitted in evidence here. I infer, from that failure, that Duclersaint's testimony that the check was based on the $19.45 prevailing rate, is correct.

warned before, on May 18, about his workmanship, and that he had reported to work on May 22 without the proper tools to do his job. I find, further, that the fact that he complained about his wages on May 12 and 19 had nothing to do with his discharge. Charon had begun his employment by entering into an employment agreement with Duclersaint under which not only would he not be paid the union scale, but not the predetermined prevailing rate required by law. Moreover, the agreement also called for no deductions for Federal and state income taxes, or social security. Both parties bear responsibility for whatever illegal conduct was involved in that bargain. After that, Duclersaint did pay the prevailing rate with proper deductions. According to his testimony, Charon was still unhappy, but there is no indication that Duclersaint bore any grudge toward Charon. As the former stated, ''I didn't want to fire him. Why do I need to fire the guy because the guy needs people to do the job. It was him and another guy on the job that day.''

In the light of these findings, I do not find that the General Counsel has presented a prima facie case for a violation of Section 8(a)(1) and (3) of the Act. *Wright Line*, 251 NLRB 1083 (1980).

CONCLUSIONS OF LAW

1. The Employer, Star Drywall, Plaster & Painting Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Painters District Council No. 35, International Brotherhood of Painters and Allied Trades, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The Employer has not violated Section 8(a)(1) and (3) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

That the complaint be, and it is, dismissed.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

SUPPLEMENTAL DECISION

GEORGE F. MCINERNY, Administrative Law Judge. On April 5, 1990, I issued a decision in this matter. On September 25, 1990, the National Labor Relations Board issued an order remanding the proceeding to me for additional factual findings and to consider factual findings already made.

In particular, I have been directed to consider: (1) ''The uncontracted testimony of Union Representative William Murphy regarding the jobsite conversation between Murphy, Business Representative Harriman and [Respondent] Duclersaint, including Duclersaint's statements to the union representatives and Murphy's statements to Duclersaint that Charon was a union member sent to work for the Respondent to procure the prevailing wage for all the employees on the job. The effect of this testimony on the issues of the Respondent's anti-union animus and the Respondent's union activity.''

(2) ''Duclersaint's testimony that he was aware that Charon and Quigley had gone to the union during the May 10 walkout and had asked for '$26 something an hour' on their return. The effect of this testimony on the Respondent's knowledge of Charon's union activity should be considered.''

(3) ''The testimony of Duclersaint that under his system of discipline he rarely discharged any employee and those employees he did discharge were first given two or three warnings and, usually, an opportunity to perform a task that they could do adequately. The effect of this testimony on the issue of the reason for discharge should be considered.''

A. *The May 12 Meeting*

As I noted in my April 5, 1990 decision, the record, from the point when Robert Charon reported to work as a drywall taper at Respondent's job in Marshfield, Massachusetts, was very confusing. I do think it was clearly established that Charon and Duclersaint, at the former's urging, entered into an arrangement whereby Charon would be paid $125 per 8-hour day with no deductions or withholdings for state or local taxes. There is no dispute that Charon was hired not through the Union, but because of a chance meeting between him and Duclersaint early in May.

Duclersaint employed carpenters and drywall tapers on the Marshfield job. The carpenters' part of the job was union, but the tapers' part was not. On May 10, when Charon had been on the job for about 2 hours, two other tapers, Wilson and Kimball, heard from a union carpenter that the job was union. Thereupon Wilson and Kimball, together with Charon, and a helper named Quigley walked off the job. In my prior decision, not really giving credit to Charon's story that after walking off the job he went to see Harriman of the Union, I found that Charon had gone ''somewhere.'' Reviewing the record, particularly the testimony of William Murphy, I now find that Charon did contact the Union during the brief walkout on May 10.

Murphy further testified that he talked to Business Representative Ralph Harriman on the morning of May 12; that Harriman told him that Charon was working at Duclersaint's job in Marshfield, a prevailing rate job; that Charon had told him that the prevailing rate was not being paid; and that Harriman wanted Murphy to accompany him to the job to check on the payment of prevailing wages on this job.

When Harriman and Murphy met with Duclersaint that day, Duclersaint, accused them of having caused the walkout on May 10.[1] They denied this and Murphy told Duclersaint that ''Bob Charon is a union member, and we sent him here to work for you because we know you are not paying the prevailing wage. And we told Bob to stay here and work for you and to get the prevailing wage for himself and everybody else who is working here.''[2] There ensued an argument, with Duclersaint threatening to call the police.

This testimony by Murphy, while uncontradicted, was based upon misinformation, or facts, which Murphy knew

[1] Duclersaint testified that Harriman had come in the week before to ask him to ''sign up with the union.'' He had replied that he did not know at that time what he would do.

[2] These statements are not accurate, except perhaps, for the last sentence. Murphy was not involved and did not know how or why Charon was hired, but there is no question that Charon was not initially sent to the job by the Union. Nor did Murphy know that Duclersaint was not paying the prevailing wages, because the purpose of the Harriman and Murphy visit was to find out about the charge by Charon that those rates were not being paid.

only through his conversations with Harriman. Despite this, based on Murphy's testimony of what he said to Duclersaint, I would be justified in finding that Duclersaint was told that Charon had been sent there by the Union and was asked to stay there by the Union to secure the proper wage rate for himself and all the rest of Duclersaint's employees.

Charon, however, testified that at the end of that day, Friday, May 12, he received his check and Quigley's check from Duclersaint. Charon's check was in the amount of $328.12, which, as I have found in my prior decision, works out to just about $125 per day. According to Charon, he did protest the failure to pay the prevailing rate, but he took the check, brought it to the union hall, and discussed the matter with Harriman, who advised him to report for work the next week. There is no indication in the record that Charon told Harriman about the ''under the table'' deal he had made with Duclersaint.

B. *Duclersaint's Knowledge of Charon's Union Activity*

Duclersaint testified that he was aware that Quigley and Charon had talked to the Union on Friday, May 12. Later that day, when Duclersaint gave Charon his check and Quigley's check Charon said to him that the job paid ''$26 something an hour and I want to make my prevailing wage.'' The prevailing rate for tapers on this job was $19.45 per hour. There is nothing in the record here to show where the $26 figure came from, but considering his union affiliations and his contacts with Harriman, I find that this figure used by Charon was probably based on the current union scale for tapers. I will discuss this later, but at this point I certainly can find that as of May 12, Duclersaint knew that Charon had something to do with the Union in spite of his previous denials that he was a union member.

C. *Duclersaint's Disciplinary System*

Duclersaint testified that his policy on dealing with employee problems involved personal efforts to help employees. He indicated that he would reassign employees and warn them two or three times before discharging them. He further stated that he had fired as few as 10 people during his 10 years in business.

There was no dispute about this testimony. So I find that Duclersaint's policy was as he stated.

Conclusions

In considering Murphy's testimony about the meeting between himself, Harriman, and Duclersaint on May 12, and Duclersaint's testimony that Charon returned from going to the Union on May 10 asking for ''$26 something an hour'' Duclersaint was aware as early as May 10, and certainly by May 12, that Charon was engaged in union activities. I am not so sure what these activities were. Murphy mentioned that Harriman said on May 12 that Charon was on the job under his instructions. Murphy also said that when he and Harriman met Charon on the morning of May 12 he told them he had talked to two other tapers, but that he did not recognize them. Here we have Charon quoted by Murphy but this incident, or even this meeting, was not mentioned by Charon in his testimony, nor corroborated by any other employee, and, perhaps most importantly, not by Harriman. There was no reason given why Harriman was not available to testify. His testimony would have been important, if not critical, in regard to his meetings with Charon, and the nature of his assignments to Charon, as well as his meetings with Duclersaint. I did not in my original decision make any adverse inferences based upon Harriman's failure to testify, but in a case like this which depends almost entirely on inferences for the conclusion the General Counsel seeks, I must decline to draw inferences in support of the General Counsel's theories in areas where Harriman's testimony would have been pertinent.

Since I do not credit much of what Charon said, I cannot find that his statement as reported by Murphy, was accurate. There are no other references to Charon's contacts with any other employees during his short tenure on the job, after Quigley left on May 11. Therefore, I cannot find, or infer, that Charon engaged in any union activities on the job after May 11, except for the question of his own wages.

There is no question here that the prevailing wage rate was $19.45 per hour. The table of rates predetermined for this job by the state were supposed to be posted on the job. Charon denied that the rates were posted, finally admitted that Duclersaint had shown him a sheet with rates on it, but claimed that the rates on there were wrong, that the real rate was ''$27 or something, because at his first meeting with Harriman on May 10 Charon made an assumption that the prevailing rate was $27. The reason for this assumption were not given by Charon, and, of course, not by Harriman. In these circumstances I felt when I wrote my original decision, and I still believe, that Charon's insistence on the $27 (ore $26) rate, without consultation on that rate, as opposed to the actual prevailing rate, showed that Charon was in fact acting solely on his own behalf. My original views, based on Duclersaint's testimony and Charon's shifting and equivocal testimony about the prevailing wage rate schedule, are not altered by Murphy's testimony. That testimony shows that Duclersaint was told that Charon was on the job to represent the interests of the Union. The extent of that agency, in the absence of any testimony from Harriman, is unclear. My understanding of the credible evidence, discounting Murphy's report of Charon's statement that he had talked to other, unknown, employees about the prevailing rate situation, is that after receiving his first week's pay, based on his deal with Duclersaint, Charon protested that he should be paid at the $27 rate. In his second week, as I have found in my prior decision, Charon was paid at the correct prevailing rate of $19.45. He still protested, again asking for the $27 rate. This does not sound to me as if Charon was engaged in a mission for the Union to assure the payment of the prevailing rate for all employees, but on a solo mission for his own personal benefit.

Be all that as it may, I am constrained to find that Charon, as the agent of the Union, was engaged in union activities, and that Duclersaint knew about it.

Having established Charon's union activity, and the Respondent's knowledge of that activity, I now address a third criterion, the Respondent's attitude toward the Union. The facts, which are undisputed, show that early in May Harriman came to the job and asked Duclersaint to sign up with the Union. Duclersaint testified that he would not at that time, because of a problem he was having with the carpenters' union, which represented some of his other employees.

At the meeting of May 12, Murphy's testimony shows that Duclersaint, was angry because he believed that the union representatives had ''told people not to work for me.'' Murphy testified that he denied this and stated that the Union had told Charon to stay on the job and to get the prevailing wage for himself and others. Then meeting the degenerated into a shouting match, almost, as Duclersaint said in his testimony, into a physical confrontation. There was a threat to call the police, and Murphy saw Duclersaint on the telephone as he left. Murphy assumed he was calling the police, but there is no further evidence on that.

I cannot find any substantial evidence in these events to establish antiunion animus. Duclersaint had another union on the job, and had a ''problem'' with that union, but that is not evidence of a discriminatory motivation toward that union, or this Union. Duclersaint was angry because he thought the Union had told employees to leave his job. The record shows that four employees did leave the job on the morning of May 10, Charon, Quigley, Wilson, and Kimball. Of these, the only one who testified was Charon and he offered no real explanation of why they all left. Wilson, Kimball, and Quigley as well as Harriman did not testify. Murphy, who by his own testimony did not become involved in the Marshfield job until the morning of May 12 could not testify about the events of May 10, and he knew only that Charon had been sent back to the job.

At the end of the March 10 incident Charon and Quigley returned to the job and were rehired without question, even though Duclersaint may well have known at that time that they were connected with the Union. We do not know why Kimball and Wilson did not return.

The former filed a complaint with the Massachusetts Department of Labor and Industries around May 26, 1989. This record contains a reply to that claim by Duclersaint, but no further information.

On the basis of this record, there is insufficient evidence upon which I can make a finding that Duclersaint bore any ill-will against the Union for any reason other than his belief that union representatives had come on to his job and induced his employees to abandon their jobs.[3] There is no evidence that Duclersaint's beliefs were incorrect.[4] The argument between Duclersaint and Murphy was loud, profane, and may have involved an invitation to settle the matter with fists or a threat to call the police, but was certainly not an unusual occurrence in the course of construction industry labor relations, or an incident that, without more, would tend to establish any antiunion attitude on the part of an employer.

With respect to Duclersaint's practice in disciplining employees, the only evidence we have in this record is Duclersaint's own testimony, and the facts of Charon's discharge. In his testimony Duclersaint said that he tried to ''work with'' his employees, to help them ''to do the job right.'' He said that his practice was to speak to employees if they were not working properly, at least two or three times before firing them, and sometimes put them on another job, ''doing something they can do right.''

As far as Charon was concerned, Duclersaint found no fault with his work or a taper for the first few days. Then he was assigned to plastering a second coat on the walls along with taping, and it was then, on Thursday, May 18, that Duclersaint spoke to Charon about his work. According to Carl Smith, a former employee of Duclersaint,[5] Duclersaint was trying to help Charon, but did tell him that his work was not acceptable. Duclersaint himself said that the work Charon was doing was ''a mess. There is no way that the architect was going to accept the job.'' He spoke to Charon about this, and also said that he was trying to help him.

On Monday, May 22, Charon came on the job without his tools. Duclersaint walked into the room where Charon was working, applying plaster to a window frame, using a piece of sheetrock in place of a plaster holder, or ''hawk.'' Duclersaint asked Charon what he was doing, and told him that he could not work like that. Charon responded by ''arguing and screaming'' in a display that both Duclersaint and Carl Smith, who was in an joining area and who testified that he heard the conversation, called ''disrespectful.'' Duclersaint told Charon that he had a ''big mouth,'' but did not fire him. Instead he walked away and told Charon that if he wanted to work he had to come with the right tools.

Charon then asked Duclersaint, ''Well, are you going to let me go?'' Duclersaint felt that Charon was ''forcing'' him to fire Charon, so he said, ''Well, yes, okay.'' Charon then left.[6]

Charon's version of his discharge is fairly consistent with this. He stated that he insisted to Duclersaint that his work was good, but did admit arguing with him, and that Duclersaint told him he had a big mouth, and to pick up his tools and leave. But Charon, even after that, knew he was not discharged because, according to his testimony, he followed Duclersaint down the hall, and asked him repeatedly if he was fired. Duclersaint said for him to leave the building. Charon replied ''I assume I'm fired,'' and Duclersaint ''just waved his hand.'' Charon then got his tools and left.

All of this shows, first, that Duclersaint did follow his stated policy. On May 22 he spoke to Charon for the second time about his work. There were real problems with that work according to the testimony of Duclersaint and Smith.[7] But Charon, rather than accepting Duclersaint's criticism and accepting his suggestion that he go home and get the proper tools for the job, sought to take a defensive and confrontational attitude, becoming ''disrespectful'' to Duclersaint. Second, it was this latter reason more than poor workmanship, that led to Charon's ultimate discharge. While the term ''big mouth,'' along with words like ''uncoopera-

[3] He mentioned two separate incidents where Harriman came on to the job and told his employees that they could not work there.

[4] Murphy denied the accusation by Duclersaint in their conversation on May 12, but Murphy could have known only what Harriman told him about the latter's prior encounters with Duclersaint or the Marshfield job. Again the absence of testimony from Harriman and other employees of Duclersaint is critical.

[5] Smith testified that he had left Duclersaint for a ''better job'' at the end of May. I think I can properly infer that Smith was not an employee of Duclersaint at the time of this hearing.

[6] Carl Smith, who heard the conversation, did not testify that he heard Duclersaint actually fire Charon. He did state that he saw the place where Charon was working and it looked, in his words ''like shit.''

[7] I have indicated my finding's on Duclersaint's credibility in my prior decision. I found Smith to be a candid witness. His recollection of the two incidents here comports with Duclersaint's, and is not inconsistent with Charon's. Smith was at the time of the hearing no longer an employee of Duclersaint, and I find his demeanor to be frank and open. I therefore, credit his testimony on the May 18 and 22 incidents here.

tive,'' or ''trouble maker'' may be a code word indicative of antiunion motivation, I think, in the present context, the expression as used by Duclersaint reflected only his resentment over Charon's intemperate response to his Employer's reprimand. Even then, Charon was not discharged until he further pressed Duclersaint, perhaps not forcing the latter to utter words of dismissal, but at least to assent with an ''okay'' or a wave of the hand, to Charon's requests to say that he was fired.

In response to the direction of the Board, I have considered the several areas that they ordered me to consider. I have also reconsidered my own prior decision. In this last regard, I believe now, as I did then, that Charon's activities were entirely individual and selfish, not involving concerted activity, but only concerned with his own pay. I should have, of course, considered the question of Charon's union activities in that prior decision, and I regret the necessity, as brought to my attention by the Board, that I rethink this aspect of the case. But the facts I have found here convince me that the General Counsel has not established a key issue here—antiunion animuls by Duclersaint against either the Union or against Charon. Nor has the General Counsel established that the discharge of Charon was due to any reason other than his disrespectful and angry response to Duclersaint's proper direction to him to go home and come back with the proper tools.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

That the complaint be, and it is, dismissed.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.